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No. 77-1689

In the Supreme Court of the United States

OCTOBER TERM, 1978

LITTON SYSTEMS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A13-A24) is reported at 573 F.2d 195. The opinion of the district court (Pet. App. A1-A12) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A25) was entered on April 4, 1978. A petition for

rehearing with a suggestion for rehearing *en banc* was denied on April 27, 1978 (Pet. App. A26). The petition for a writ of certiorari was filed on May 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the indictment against petitioner should have been dismissed because the prosecutor during preindictment negotiations offered to terminate the criminal investigation if petitioner would agree to the reopening of a related civil administrative proceeding.

STATEMENT

An indictment filed in the United States District Court for the Eastern District of Virginia charged petitioner, a corporation engaged in the construction of combat ships for the United States Navy, with filing a fraudulent claim with the Navy, in violation of 18 U.S.C. 287 (Pet. App. A27-A34). The district court dismissed the indictment (*id.* at A1-A12), but the court of appeals vacated the order of dismissal and remanded the case for trial (*id.* at A13-A24).

1. The indictment stemmed from a claim that petitioner filed in 1972 seeking $30 million as compensation for increased costs petitioner allegedly incurred under its contract to construct three nuclear submarines (Pet. App. A14). After an adverse decision by the Navy contracting officer, petitioner sought review of its claim before the Armed Services Board of Contract Appeals (the "Board"). On April 16, 1976, the Board sustained petitioner's appeal in part and awarded it more than $16 million (C.A. App. A485-A600).[1] The parties agreed not to seek reconsideration of the Board's decision (C.A. App. A39).[2]

In March 1975, while the Board proceeding was pending, a federal grand jury was impanelled in the Eastern District of Virginia to investigate the possibility that petitioner's claim had been fraudulent (C.A. App. A47, A164). When notified of the grand jury investigation, petitioner's attorney, Vincent Fuller, inquired whether there might be an alternative short of criminal prosecution (Pet. App. A14). One of the prosecutors replied that the government did not then have sufficient information to make such a determination (*ibid.*). Fuller requested that he be given advance notice of any decision to seek an indictment so that he could attempt to convince the government not to institute criminal charges (Pet. App. A14; C.A. App. A196).

Toward the end of the grand jury term, the prosecutors concluded that there was strong evidence of fraud, but that they had found insufficient evidence of criminal intent to justify prosecution (C.A. App. A190). Accordingly, they decided to permit the

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[1] "C.A. App." refers to the joint appendix in the court of appeals.

[2] The Board's award, however, remained subject to attack in the Court of Claims on the ground of fraud (Pet. App. A19).

grand jury's term to expire without the return of an indictment but to continue the investigation, with the focus solely on petitioner, rather than on individual corporate officials (C.A. App. A48-A49, A190).

At about this time, an attorney retained by petitioner to represent its employees before the grand jury suggested that the prosecutors contact Fuller to discuss alternatives to criminal prosecution (Pet. App. A15; C.A. App. A126, A191-A192). On September 9, 1976, the chief prosecutor advised Fuller that the investigation had developed evidence that demonstrated the fraudulent nature of petitioner's claim, but that, in view of the lack of sufficient evidence on the element of intent, the government would not seek an indictment prior to the end of the grand jury's term (Pet. App. A15; C.A. App. A49-A50, A193-A194). The prosecutor also informed Fuller that the investigation would proceed in an effort to develop additional evidence of intent (*ibid.*). The prosecutor stated that the government might consider terminating its criminal investigation, but he expressed reluctance to outline the government's proposal without receiving prior assurances that the proposal "would not be taken as a threat or treated as other than a good faith attempt to resolve the intent question" (*ibid.*). Fuller responded that he desired to continue the discussion and that he would terminate the talks if he considered them improper (C.A. App. A50, A194).

The prosecutor then offered the following proposal: (1) both petitioner and the Navy would move to re-

open the Board proceedings;[3] (2) petitioner and the Navy would jointly apply to the district court for an order pursuant to Fed. R. Crim. P. 6(e) to permit inspection of the grand jury materials by both parties for use in the reopened Board proceedings; (3) the government would not assert fraud as a defense in the Court of Claims to any final Board judgment rendered in favor of petitioner and would not institute any civil fraud actions; (4) the government would terminate its criminal investigation of petitioner's claim (C.A. App. A50-A51, A194). In addition, after receiving further evidence in the reopened proceeding, the Board would be free to modify its award in favor of either party or to let its original award stand (*ibid.*).

Fuller reacted favorably to the proposal and suggested that the discussions continue at a second conference. At that conference, held on September 14, 1976, the prosecutors outlined the evidence establishing the falsity of petitioner's claim and discussed with petitioner's representatives the necessary procedures for reopening the Board proceeding and obtaining the required corporate and governmental approvals of the settlement (C.A. App. A51, A195).[4]

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[3] The government attorneys believed that the Board's ruling in petitioner's favor had been based upon certain false representations made by petitioner in support of its claim (C.A. App. A48).

[4] At the outset of the meeting, petitioner's representatives again agreed that the discussion would not be used at a later date as the basis for a claim of prosecutorial misconduct (C.A. App. A51, A195).

At no time during either meeting did petitioner's representatives intimate that there were any improprieties in the proposals under discussion. On September 15, 1976, however, Glen McDaniel, petitioner's executive board chairman—who had not been present at either meeting—complained to Deputy Attorney General Tyler that petitioner was being threatened with indictment if it did not agree to reopen the Board proceeding (C.A. App. A51-A52, A195-A196).[5] After inquiring into the nature of the discussions, the Deputy Attorney General informed McDaniel, by letter dated October 7, 1976, that he had found no impropriety, and he suggested that Fuller contact the government's attorneys to resume the negotiations (C.A. App. A67).[6] In addition, the Deputy Attorney General reaffirmed the point, previously explained to Fuller (C.A. App. A120-A121, A191), that government counsel participating in the negotiations were without authority to reach a settlement without approval from their superiors in the Department of Justice (C.A. App. A67).

At Fuller's request, a third meeting was held on October 12, 1976, for the purpose of exploring further the settlement proposal (C.A. App. A196-A197,

[5] When informed of the substance of McDaniel's complaint, Fuller told the prosecutor that it violated their understanding, concerning discussion of the proposal (C.A. App. A52, A195).

[6] The text of Deputy Attorney General Tyler's letter is reproduced in the opinion of the court of appeals (Pet. App. A16-A17 n. 1).

A201). In a letter from McDaniel dated November 1, 1976, petitioner rejected the government's settlement offer (C.A. App. A68-A71).

2. In early January 1977, on the basis of additional evidence developed by the government after the expiration of the original grand jury's term, the prosecutors sought and obtained authorization from Attorney General Bell and Acting Deputy Attorney General Thornburgh to present the matter to a new grand jury for the purpose of seeking an indictment (C.A. App. A52, A128-A133, A197, A242-A243).[7]

The prosecutors notified Fuller about the decision to prosecute. At Fuller's request, on March 11, 1977, the prosecutors met with petitioner's representatives, who offered to reopen the Board proceeding if the government were willing to forego instituting criminal charges (C.A. App. A197-A198). On April 5, 1977, petitioner's representatives met with the Attorney General, who rejected petitioner's proposal, stating that in his view there was sufficient evidence to warrant prosecution (C.A. App. A198-A199). On the following day, the grand jury returned the instant indictment (Pet. App. A27-A34).

3. Petitioner, represented by new counsel, moved to dismiss the indictment on the ground of governmental misconduct (C.A. App. A11). In granting

[7] The additional evidence consisted of documents that had not been shown to the first grand jury, an FBI analysis of certain documents, and testimony of witnesses who had not appeared before the first grand jury (C.A. App. A129-A133, A242-A243).

the motion (Pet. App. A1-A12), the district court observed that "[h]ad the bargain been proposed *after* indictment it arguably could be justified," but it concluded that the government had engaged in misconduct through its alleged "*threat* to use, as *well* as the actual use of, the grand jury as a bargaining tool in an effort to upset the final civil award to which [petitioner] was entitled" (*id.* at A6-A7; footnote omitted; emphasis in original).

The court of appeals vacated the dismissal order, holding that the government's actions in conducting pre-indictment negotiations with petitioner were permissible under this Court's ruling in *Bordenkircher* v. *Hayes*, No. 76-1334, decided January 18, 1978 (Pet. App. A18-A22). In addition, the court concluded that the prosecutors had acted in good faith in initiating the negotiations, that they had not threatened to indict petitioner if it rejected the government's proposal but had merely stated that the investigation would continue, and that the Attorney General's subsequent decision to prosecute was not vindictive or retaliatory (*ibid.*).

ARGUMENT

1. Petitioner's effort to obtain pre-trial review of the validity of the indictment should be rejected as premature. If the district court had denied petitioner's motion to dismiss, its ruling would not have been subject to interlocutory appeal. See *United States* v. *MacDonald*, No. 75-1892, decided May 1, 1978; *Parr*

v. *United States*, 351 U.S. 513; *Cobbledick* v. *United States*, 309 U.S. 323. Accordingly, since the court of appeals' reinstatement of the indictment puts petitioner in the same position as the district court's denial of its motion, there is no reason for this Court to delay the trial by reviewing the case before final judgment. Petitioner may be acquitted at trial, in which case its claim will be moot. If, on the other hand, petitioner is convicted and its conviction is affirmed, it will then be able to present the claim raised in its petition, as well as any other issues that may arise during the trial, by seeking review in this Court of the final judgment. *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 257-259.

2. In any event, there is no merit to petitioner's contention (Pet. 15-27) that the indictment should have been dismissed because petitioner was denied due process.

a. Despite petitioner's repeated assertions to the contrary, the court of appeals correctly concluded (Pet. App. A19) that petitioner was not "threatened" with indictment if it did not agree to the government's proposal. Indeed, the prosecutors could not have threatened petitioner with indictment, since—as they candidly acknowledged to petitioner's counsel during their discussions in September and October 1976—they believed there was insufficient evidence of criminal intent to warrant prosecution at that time. As the prosecutors explained, no indictment would be filed against petitioner unless additional evidence of intent was developed for presentation to

the grand jury and the prosecution was authorized by the appropriate officials in the Department of Justice. The prosecutors simply notified petitioner that unless some agreement were reached permitting presentation to the Board of the newly discovered evidence, they would continue their investigation in an effort to determine whether the false claims had been presented with criminal intent. Additionally, the prosecutors disclosed to petitioner's counsel the evidence of falsity that had already been discovered, so that petitioner could make an informed response to the government's proposal.

In these circumstances, as in *Bordenkircher* v. *Hayes*, No. 76-1334, decided January 18, 1978, slip op. 8, the prosecutor "openly presented [petitioner] with the unpleasant alternatives"—in this case the alternatives of agreeing to reopen the Board's judgment or risking the possibility that the continuing investigation might lead to criminal fraud charges and that the Board's award might be upset in the Court of Claims.

Since the Board's award was vulnerable to attack in the Court of Claims as having been procured by fraud, petitioner was subject to continued criminal investigation, and the government's intention to continue its investigation "was clearly put forth at the outset," petitioner was "fully informed of the true terms of the offer when [it] made [its] decision" to reject that offer. *Id.* at 3.

Moreover, the prosecutor's decision whether or not to terminate the investigation, like the determination

"whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher* v. *Hayes*, *supra*, slip op. 7; footnote omitted. See also *United States* v. *Nixon*, 418 U.S. 683, 693; *Newman* v. *United States*, 382 F.2d 479 (C.A. D.C.); *United States* v. *Cox*, 342 F.2d 167, 171 (C.A. 5), certiorari denied, 381 U.S. 935. It was therefore permissible to confront petitioner with the realistic possibility that further investigation might warrant its prosecution unless it agreed to reopen the Board proceeding for the purpose of permitting the parties to introduce additional evidence, so long as petitioner was "free to accept or reject the prosecution's offer." *Bordenkircher* v. *Hayes*, *supra*, slip op. 6.

Although petitioner emphasizes (Pet. 23) that the government repudiated its offer before petitioner belatedly sought to accept it, the record clearly shows that petitioner was free to accept or reject the offer until the circumstances changed materially. Petitioner's representatives spent nearly two months weighing the essentially monetary costs and benefits involved, and they ultimately decided to reject the offer. Only after the government had obtained additional evidence of criminal intent and the prosecution had been authorized did petitioner belatedly seek to reach a settlement. At that point, in light of the changed circumstances that properly bore on the prosecutorial decision, the government was fully justified in refusing petitioner's offer.

This case is therefore unlike *Blackledge* v. *Perry*, 417 U.S. 21, and *North Carolina* v. *Pearce*, 395 U.S. 711, upon which petitioner relies (Pet. 18-22), since those cases involved "the States' unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction." *Bordenkircher* v. *Hayes*, *supra*, slip op. 6. Here, in contrast, petitioner was not punished for exercising its right to rely on the finality of the Board's decision. Rather, the indictment resulted from the development of sufficient evidence of fraudulent intent, which the government admittedly lacked at the time it made its offer to petitioner. See *Blackledge* v. *Perry*, *supra*, 417 U.S. at 29 n. 7; *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 726.[8] Nor can the indictment be attributed to actual prosecutorial vindictiveness, since the prosecution was personally authorized by the Attorney General and the Deputy Attorney General, neither of whom had been involved in the settlement discussions. Both lower courts agreed that these officials, "who made the critical decisions in this case, were [not] vindictive or retaliative" (Pet. App. A20).

[8] For this reason, petitioner's reliance (Pet. 24-26) on *United States* v. *Groves*, 571 F.2d 450 (C.A. 9), *United States* v. *DeMarco*, 550 F.2d 1224 (C.A. 9), certiorari denied, 434 U.S. 827, and *United States* v. *Ruesga-Martinez*, 534 F.2d 1367 (C.A. 9), is misplaced. In each of those cases, there was not only the appearance of vindictiveness, but also a strong probability of actual vindictiveness because the only meaningful intervening event between the initial and revised prosecutorial decisions had been the defendant's successful assertion of his legal rights. Here, however, since the record reflects a neutral explanation for the initiation of the prosecution, and since no actual retaliatory motivation on the part of the Attorney General has been shown, the indictment was permissible even though it was returned after petitioner had exercised its right to reject the government's proposal. See *United States* v. *Thurnhuber*, 572 F.2d 1307, 1310 (C.A. 9); *United States* v. *Nell*, 570 F.2d 1251, 1254-1255 (C.A. 5); *United States* v. *Ricard*, 563 F.2d 45, 47-48 (C.A. 2), certiorari denied, No. 77-5852, March 6, 1978; *United States* v. *Partyka*, 561 F.2d 118, 124-125 (C.A. 8), certiorari denied, No. 77-5461, January 16, 1978.

b. Petitioner contends (Pet. 15-18), however, that the government's settlement offer was improper because it was an effort to resolve the related civil and criminal aspects of petitioner's case. We recognize the uniquely sensitive position occupied by government counsel whenever parallel criminal and civil proceedings are pending or contemplated against a single litigant. At the same time, the prosecutor must necessarily have broad discretion to weigh the "[m]yriad factors" that should be considered in determining the proper charges to bring in a particular case. *Newman* v. *United States*, *supra*, 382 F.2d at 481. See *United States* v. *Nixon*, *supra*, 418 U.S. at 693; *United States* v. *Cox*, *supra*, 342 F.2d at 171. In a given case, the prosecutor may properly conclude that society's interest will best be served by pursuing alternatives short of criminal prosecution.[9]

[9] Indeed, a memorandum from the Attorney General relating to the exercise of prosecutorial discretion instructs Department of Justice attorneys to consider the possibility of civil, administrative, or other proceedings in lieu of criminal prosecution (C.A. App. A79-A81). A similar policy was adopted by Congress in Section 305 of the Food and Drug Act, 52 Stat. 1045, as amended, 21 U.S.C. 335, which provides that the

The government, of course, must not be allowed to abuse its position as prosecutor to coerce a civil litigant into an unjust settlement, but the facts here show no such abuse. To begin with, petitioner is unlikely to have been coerced into giving up a $16 million award by the possibility that it might be subject to, at most, a $10,000 fine for a criminal offense. Moreover, the history of the negotiations rebuts any inference that the government abused its prosecutorial powers in an effort to compel petitioner to accept an unfair settlement. It was petitioner's counsel who first suggested that the parties discuss an alternative to criminal prosecution. Then, after carefully considering the government's offer, petitioner rejected it. Finally, as the court of appeals pointed out (Pet. App. A22), there was nothing unfair about the substance of the government's proposal, since "[t]he material elements of both the civil and criminal proceedings were closely interwoven, and the proposal was an effort to resolve all facets of an essentially single controversy." The proposal sought reconsideration of the Board's award in light of information not previously available to the Board. It thus was de-

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target of an investigation should be given notice of impending charges to permit an opportunity for negotiation of a settlement prior to indictment. Following service of this statutory notice, the vast majority of cases have been settled without a criminal prosecution. *United States* v. *Kordel*, 397 U.S. 1, 4 n. 5. Similar conferences are also routinely held in tax cases before a recommendation for prosecution is made. See, *e.g.*, *United States* v. *Goldstein*, 342 F. Supp. 661, 664-668 (E.D. N.Y.).

signed to bring out the truth about petitioner's claim, not to deprive petitioner of its right, if any, to compensation. Compare *MacDonald* v. *Musick*, 425 F.2d 373 (C.A. 9), certiorari denied, 400 U.S. 852.

Nor, contrary to petitioner's assertion (Pet. 17-18), did the prosecutor's conduct contravene the ethical standard expressed in DR 7-105(A) of the ABA Code of Professional Responsibility, which provides that "[a] lawyer shall not present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter." Both the first grand jury's investigation and the investigation pursued after that grand jury's term had expired were conducted for the purpose of establishing criminal liability—not " 'solely to obtain an advantage in a civil matter.' " The so-called "threat" was merely the government's truthful statement that it planned to continue its investigation unless the entire matter could be settled before the Board and that it intended to seek an indictment if evidence of a crime was uncovered.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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